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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 636

A. G. REEVES STEEL CONSTRUCTION COMPANY,
a corporation,

Petitioner,

vs.

Elizabeth Weiss, Executrix.
~~COMMISSIONER OF INTERNAL REVENUE,~~

Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI.

The A. G. Reeves Steel Construction Company, a corporation of Ohio, by John E. Hughes, its attorney, prays that the Writ of Certiorari be issued to review the judgment of the Circuit Court of Appeals of the Sixth Circuit in the above entitled case.

Summary Statement of Matter Involved.

Petitioner's petition (R. 4 to 23) alleged it has made overpayments of income and profits taxes for 1918 and 1919 to respondent's intestate; that it had filed timely claims for the refund thereof and that these refund claims for 1918 and 1919 had never been disallowed but on the contrary had been allowed by the Commissioner of Internal Revenue; that petitioner did not sue on an account stated but brought the action under the Internal Revenue Laws for money had and received by defendant's intestate in excess of the tax properly due for 1918 and 1919 (pp. 6, 7).

Respondent filed no answer but only a motion to dismiss the petition on the grounds (1) that the court had no jurisdiction and (2) that the petitioner failed to state a cause of action (R. 24).

The District Court took the case under consideration solely on the petition and motion and without evidence or hearing and granted the motion, based on its fact finding (made without evidence or hearing) without anything in the record to support it that the suit was not brought within two years of the disallowance of the refund claims (R. 26). Although it took the case under consideration solely on the petition and motion and nothing else and without any court hearing and any evidence being introduced it went outside the record and found, contrary to the allegations of the petition which the motion to dismiss necessarily admitted, that the refund claims had been disallowed in 1924 (R. 26). The petition alleged they had never been disallowed. The motion to dismiss necessarily admitted this allegation.

The Circuit Court of Appeals held that the District Court had jurisdiction (R. 35) but that in deciding the motion it had a right to go outside the record and take judicial notice of matters in the record of another case (based on a different cause of action and against a different Collector) and on this basis the Court of Appeals also held the letter, at pages 9 to 23 of the record, was notice of the disallowance of the refund claims. A reading of the letter shows there is not one word in it about the disallowance of any claim.

Jurisdiction.

Petition for rehearing was denied June 25, 1941 (R. 38).

Questions Presented.

Did the courts below, on a petition and motion to dismiss it, have a right to go outside the record, make a finding of fact based on matter *de hors* the record and base judgment thereon without according petitioner a hearing or a right to rebut the matter so judicially noticed?

Was this action of the courts below, in denying petitioner the right to be heard on this vital fact and in finding the fact against petitioner without evidence or any hearing at which evidence was introduced, a denial of due process of law in violation of the fifth amendment?

Was it such a departure from the ordinary and orderly course of judicial proceedings as to warrant the intervention of this court?

Disregarding the foregoing questions did the court below err in holding the suit outlawed where the Statute of Limitations was not pleaded as a defense, in view of *Retzer* v. *Wood, Collector,* 109 U. S. 185?

Reasons Relied On for the Allowance of the Writ.

The petition alleged facts showing a clear right in petitioner to judgment for the money sued for. No fact alleged was put in issue. A motion to dismiss was filed (R. 24). The District Court granted the motion on a ground not stated in the motion (R. 25, 26). It found as a fact (although no fact pleaded was in issue) that the refund claims had been disallowed by a credit (R. 26) and that taxpayer was so notified by letter dated February 2, 1924 (R. 26). This letter is in the record at pages 9 to 23, as part of the petition, and there is not one word in it supporting this finding. Also, the petition alleged the portion of the refund claims sued for had never been disallowed.

The writ should be granted because:

First: For a trial court to take a case under consideration solely on a petition and a motion to dismiss (necessarily admitting for the purpose of the motion all facts pleaded), and proceed without evidence or hearing to make an essential finding of fact (contrary to the fact alleged in the petition) constitutes so far a departure "from the accepted and usual course of Judicial proceedings as to call for the exercise of this court's power of supervision". It is a reasonable assertion that in the great collective experience of all Justices of this court no such a course of judicial proceedings has been observed before now.

Second: Assuming (but not conceding) a trial court has a right, on petition and motion to dismiss it, to go outside the record and notice a fact not made the basis of the motion then even if the making of a credit is a disallowance of a refund claim it is at most only *prima facie* so (see page 8 hereof). A party is entitled to a hearing on the question and to a chance to show by evidence that the claim was not disallowed. A denial of such hearing is plainly a denial of due process of law.

Third: The action of the Circuit Court of Appeals in upholding the dismissal of the suit, on the ground that R. S. 3226 was not complied with, is not only contrary to the allegations of the petition but unquestionably squarely contrary to the decision of this court in *Retzer* v. *Wood,* 109 U. S. 185. Petitioner relied on this case but the court below wholly ignored it—although writing a many page opinion. The decision below is also contrary to and in conflict with *Toledo Edison Co.* v. *McMaken,* 103 F. (2d) 72, 75, where, as in the case at bar, the action was against a Collector's intestate. This case also the court below wholly ignored although relied on by petitioner and urged on the court below. For the reason alone that the decision conflicts with *Retzer* v. *Wood,* 109 U. S. 185, the writ should issue.

The Court below held there was jurisdiction and it could not deny the petition itself stated a cause of action.

For any one of the other foregoing reasons and because there is no other way such a patently wrong decision can be corrected this petition should be granted.

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